UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 520

Case No. 563: DESTA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding, Mr. Ahmed Osman, Second Vice-President, Mr. Luis de Posadas Montero,

Whereas, on 21 September 1990, Tibebe Desta, a staff member of the United Nations, filed an application, containing the following pleas:

"II. PLEAS

"7. The Tribunal is respectfully requested:

(a) To find that I had the right to be considered for promotion to P-3 level at the time of the [Appointment and Promotion] Committee's review in 1985;

(b) To find that the decision taken to decline my promotion on ground that I was a 200 Series staff member was improper since my employment with the Organization has always been under 100 Series of contract;

(c) To find that the decision to defer action on my case by ECA [Economic Commission for Africa] Administration until 1987 was not proper;

(d) To disregard the recommendation of the Joint Appeals Board as stated under paragraph 28: 'The Panel recommends that no action be taken on the appellant's

request for promotion or retroactive promotion to 1985' and to order the Respondent to grant me a promotion to P-3 level effective 1 January 1985;

(e) To uphold part of Joint Appeals Board's recommendation stated under paragraphs 29 and 30(i) regarding the granting of an SPA [Special Post Allowance] for the period 5 September 1982 to 25 November 1985, in compensation for work performed at a higher level during that period and (ii) the payment of monetary compensation for the injury regarding the loss I suffered as a result of lack of salary increase for a period of three months salary."

Whereas the Respondent filed his answer on 4 March 1991,

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 25 November 1965, as a Clerk at the GS-6 level in the Finance Section of the Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia. He served initially on a series of short-term appointments until 1 August 1966, when he was granted a one-year fixed-term appointment. On 1 August 1967, he was granted a probationary appointment, on 1 May 1968, a regular appointment and on 1 March 1974, a permanent appointment. On 1 November 1967, he was promoted to the GS-7 level, as Finance Clerk, on 1 August 1970, to the GS-8 level, as Finance Assistant and on 1 April 1978, to the GS-9 level, as Senior Finance Assistant.

On 15 May 1977, the Applicant was assigned temporarily from ECA to the Office of Financial Services at Headquarters for a one-year period of in-service training. Just prior to completion of the training programme, on 1 April 1978, the Applicant was assigned for two years to the African Institute for Economic Development and Planning (IDEP) in Dakar, Senegal, as Assistant Finance Officer at the Professional level, against a project post. The post was classified at the L-3 level, but the Applicant initially encumbered it at the L-1 level. On 1 January 1980, he became an Associate Finance Officer and his level was changed to L-2.

In 1979 the General Assembly had established the system of competitive examination for promotion of staff from the General Service to the Professional category. On 20 November 1980, the Administrative Tribunal

rendered Judgement No. 266, Capio, against the Secretary-General of the United Nations, in favour of the Applicant in that case. Subsequent to that Judgement, on 10 March 1981, the Administration issued Information Circular ST/IC/81/19 to exempt from the 1979 competitive examination a further group of General Service staff in situations similar to Mrs. Capio.

The Applicant was found eligible for special review in accordance with the above-mentioned Circular and, on 6 December 1984, the Secretary-General approved the inclusion of the Applicant's name on the 1979 Promotion Register. His promotion to the P-2 level, effective 1 January 1980, was implemented against an ECA post by a Personnel Action Form dated 6 May 1985.

In the meantime, the Applicant's assignment at IDEP was successively extended for further fixed-term periods. In early 1982, the Governing Council of IDEP decided to combine at the L-5 level the former posts of Chief of Administration at the L-5 level and Finance Officer at the L-3 level. The Applicant assumed the functions of both posts on 2 February 1982, when he was designated Officer-in-Charge of Administration. He continued to serve at the L-2 level. On 19 July 1982, his functional title was changed to Acting Chief, Administration and Finance.

On 15 March 1985, the Director of IDEP wrote to the Executive Secretary of ECA, recommending that the Applicant be promoted to the P-3 level in view of the level of the functions and responsibilities he had assumed during his assignment with IDEP and his highly competent performance. On 22 November 1985, the Director of IDEP wrote to the Chief of the ECA Administration and Conference Services Division expressing his concern that his "recommendation ha[d] not been communicated to the Appointment [and Promotion] Committee and as a result no action ha[d] been taken". He urged him to take prompt action and stated his understanding "that there is a P-3 post available at ECA Finance Section against which Mr. Desta could be considered for a promotion."

On 26 November 1985, the Applicant was assigned for a two-year period as Administrative/Finance Officer at the P-2 level with the Office of the Commissioner for Namibia in Luanda, Angola.

According to the record of the case, the ECA Administration did not comply with the IDEP Director's request to present the Applicant's case to the Appointment and Promotion Committee (APC), ECA, for consideration at its

1985 review. Almost three years later, the Deputy Chief of the ECA Administration and Conference Services Division explained this decision in a cable of 3 October 1988, on the grounds that the Applicant "had expressed his desire not to return to ECA and the available P-3 post was then advertised for recruitment".

On 2 January 1986, the Applicant instituted a recourse procedure with the Chairman of the APC/ECA, challenging the exclusion of his name from the 1985 P-3 Promotion Register. The Applicant's recourse was considered by the APC/ECA at a meeting held on 26 June 1986. According to the Deputy Chief of Administration, "the APC decided that as Mr. Tibebe Desta was a 200 Series staff member the case did not fall under its purview".

In a further communication, dated 25 October 1986, to the Chairman of the APC/ECA, the Applicant argued that ECA had assigned him the functions of Chief of Administration at IDEP for almost four years, that "unfairness and injustice" had been involved in his case and requested that his case be "reviewed in the forthcoming regular meeting".

According to the Respondent, the Applicant's case was considered by the APC at meetings held on 10 and 25 November 1986, both of which were attended by the ECA Chief of Personnel as an ex-officio member. The APC decided not to undertake a substantive review of the Applicant's case until additional information was provided by the Personnel Section, particularly regarding the possibility of recommending a staff member on assignment for promotion. The Chief of Personnel informed the Committee that he had sought advice from Headquarters, and had been informed by the Office of Personnel Services (OPS) that a recommendation for promotion was required from the Office of the Commissioner for Namibia, the Applicant's current employer, and secondly, that there should normally also be a recommendation for promotion from the ECA Administration's Budget and Finance Section. OPS further advised that since the Applicant "was away until the end of November 1987, his case for promotion should be reviewed in 1987, when he is expected to return to ECA" and that the local Personnel Officer should so inform the Applicant. There is no record in the Applicant's files that he was so informed.

On 1 July 1987, the Applicant was assigned to the Economic and Social Commission for Western Asia in Baghdad, Iraq, to serve as Acting Deputy Chief of the Finance Section (a P-3 post) for six months. Thereafter the Applicant was assigned in January 1988, from ECA to Headquarters, to the Accounts Division of the Office of Programme, Planning, Budget and Finance as Associate Finance Officer at the P-2 level. In a memorandum dated 29 February 1988, the Applicant requested the Secretary-General to consider promoting him to the P-3 level with effect from January 1985.

On 22 June 1989, the Applicant instituted a further recourse procedure with the Chairman of the APC at Headquarters challenging the omission of his name from the 1987 P-3 Promotion Register. In a reply dated 24 November 1989, the Acting Chairperson of the APC informed the Applicant that, notwithstanding the additional information presented by him, the Committee's re-examination of his case "did not reveal that there had been an omission so significant as to afford grounds for amending its previous decision".

On 11 October 1989, the Assistant Secretary-General for the Office of Human Resources Management (OHRM*) replied to the Applicant's memorandum of 29 February 1988, and stated, inter alia, that:

> "... even if you had been considered [in 1985], there is no certainty that you would have been recommended for promotion by the Appointment and Promotion Committee (APC) in that year, or that the recommendation would have been accepted. The fact that you were recommended for promotion by the Director of IDEP, and were assigned duties at a higher level than that of P-2 from 5 February 1982 to 25 November 1985, when you were Officer-in-Charge, Administration, of the African Institute for Economic Development and Planning (IDEP) in Dakar, Senegal, is not itself sufficient to establish any right to promotion".

He further stated that although "retroactive promotion to 1985 is impossible", he was willing to grant the Applicant a special post allowance (SPA) to the P-3 level "in recognition of the work [he had] performed at a higher level during the period 5 February 1982 to 25 November 1985 when [he was] assigned to IDEP...".

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* Successor of OPS

In a letter dated 10 November 1989, the Applicant requested the Secretary-General to review the administrative decision of the Assistant Secretary-General, OHRM, to grant him an SPA instead of a promotion to the P-3 level retroactive to January 1985. On 3 January 1990, the Assistant Secretary-General rejected the Applicant's request.

On 2 January 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 29 June 1990. Its conclusions and recommendations read as follows:

"Conclusions

24. The Panel concluded that the appellant had not been treated fairly and deserved to be compensated in some way for the injury he had suffered. Here was a staff membe who had consistently received the highest ratings and recommendations for promotion, who had demonstrated his mobility by serving at four duty stations over a period of twelve years and who had carried out higher-level functions on two occasions, once for three and a half years and on[c]e for six months. Yet, although he received a promotion to the Professional category (P-2) effective 1 January 1980, his subsequent possible advancement was frustrated by the Administration through errors of omission or commission. His case for promotion in 1985, was not even considered, despite four serious recommendations, and his recourse was rejected on unsustainable grounds. His case for promotion in 1986, was not properly presented by the Administration, which apparently made no attempt to obtain the information it said it needed in order to consider his case. His review for promotion in 1987, which was mandated, inter alia, by the decision of ECA's APC in 1986, did not take place due to events outside the control of the appellant, namely, the Organization's financial crisis and the new guidelines for promotion review, which he did not meet at the relevant time.

25. In considering what remedial action to recommend, the Panel first looked at the possibility of promotion to P-3. In this respect, the Panel, while recognizing that in both 1985 and 1986 review errors and shortcomings in the handling of the appellant's case for promotion had been made, could not say with any certainty what the APC would have decided had the case been properly presented to it. Nor did the Panel wish to even usurp the role of the Appointment and Promotion bodies. The Panel also took into account the clear position of the Administrative Tribunal on the question of promotion, particularly as set out in

Judgement Nos. 312, Roberts, 411, Al-Ali, 431, Narula, and 438, Nayyar. The Panel, therefore, declined to recommend either promotion or retroactive promotion.

26. The Panel then considered the offer of a Special Post Allowance as a remedial action, the course favoured by the Respondent. In this connection, the Panel was of the opinion that such an offer was inappropriate. The appellant had served in a higher level post with distinction (according to his supervisor) for a period of three and a half years and had earned the granting of an SPA. Even though the granting of an SPA is discretionary, the Panel believed that the Administration should exercise that discretion in the appellant's favour 'in recognition of the work you performed at a higher level during the period 5 February 1982 to 25 November 1985', as stated by Mr. Annan in his letter to the appellant of 11 October 1989, and not, as later proposed, 'because you may have been improperly excluded from consideration in the 1985 ECA promotion review', as stated by Mr. Annan in his letter to the appellant of 3 January 1990.

27. The Panel then considered what other type of remedy might be suitable and concluded that some form of monetary compensation was called for. In keeping with the gravity of the injury suffered by the appellant, the Panel agreed to recommend monetary compensation equivalent to three months salary.

Recommendations

28. The Panel recommends that no action be taken on the appellant's request for promotion or retroactive promotion to 1985.

29. The Panel recommends the granting of an SPA for the period 5 September 1982 to 25 November 1985, in compensation of work performed at a higher level during that period.

30. The Panel also recommends the payment of monetary compensation for the injury he has suffered equivalent to three months salary."

As of 1 March 1990, the Applicant was reassigned, under the Vacancy Management and Staff Redeployment System of Promotion, to fill a vacant P-3 post as Accountant in the Accounts Division.

On 6 July 1990, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, decided in full and final settlement:

"(a) To grant [...] a Special Post Allowance (SPA) to the P-3 level for the period 5 September 1982 to 25 November 1985;

(b) To pay [...] compensation in the amount of three months net base salary; and

(c) To take no further action on the matter."

On 21 September 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent did not present the Applicant's promotion recommendation to the P-3 level to the ECA Appointment and Promotion Committee, as requested by the Director of IDEP.

2. The Respondent improperly declined the Applicant's promotion in June 1986, on the erroneous ground that he was a 200 Series staff member.

3. The Respondent postponed the Applicant's promotion in October 1986, for lack of a recommendation which already existed in his personnel file.

4. The Respondent should promote the Applicant to the P-3 level, retroactively, from January 1985.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only to consideration for promotion. Although admitted errors and omissions on the part of the Administration deprived the Applicant from receiving fair consideration for promotion during the APC/ECA reviews in 1985 and 1986, it is a matter of speculation as to whether the Applicant would have been promoted had his candidature been given proper and full consideration. Therefore, the Applicant has no entitlement to a retroactive promotion to P-3 as of January 1985.

2. The financial payment awarded to the Applicant provides adequate compensation for the injury sustained as a result of the admitted abridgement of his procedural rights to be considered for promotion.

The Tribunal, having deliberated from 10 to 29 May 1991, now pronounces the following judgement:

I. On 15 March 1985, the Director of the African Institute for Development and Planning, Head of the Office in which the Applicant was working at the time, addressed a letter to the Executive Secretary of ECA recommending the Applicant for promotion to the P-3 level. Following this recommendation, the Applicant's name should have been included in the list of names to be considered by the Appointment and Promotion Committee (APC). This recommendation was reiterated through a different channel on 22 November 1985.

In spite of these requests the recommendation was never transmitted to the APC and, as a consequence, the Applicant's name was never considered for inclusion in the 1985 Promotion Register.

II. On 2 January 1986, the Applicant filed a recourse, which was considered by the APC on 26 June 1986 and rejected because the APC took the erroneous view that the Applicant was serving under the 200 Series of the Staff Rules and was, therefore, not within the APC's jurisdiction.

The Applicant was never duly notified of the outcome of this appeal and thus did not have the possibility of taking any further action on it. Apparently he was "given to understand" that his appeal had failed on the ground that he had not presented new information, the real reason being different.

III. On 25 October 1986, the Applicant, learning that his recourse to the APC had been unsuccessful, sent a letter to its Chairman requesting to have his case reviewed during the 1986 promotion exercise. On 6 November 1986, the Chairman of the APC requested that the Applicant's case be "processed for presentation to the Committee's meeting".

The APC considered Mr. Desta for promotion for 1986, but decided not to undertake a substantive review of his case until additional information was provided by the ECA Personnel Section regarding the legal possibility of recommending for promotion a staff member in the situation of Mr. Desta, i.e. on assignment. According to the Minutes of the APC, the answer came

verbally saying that, in Mr. Desta's situation, recommendation for promotion should come from both the office in which the Applicant was serving and from ECA and that, furthermore, as "Tibebe Desta was away until the end of November 1987 his case for promotion should be reviewed in 1987, when he is expected to return to ECA". The Minutes go on to say that "Headquarters would provide written confirmation of the above" and that "upon receipt of this written confirmation the Committee requested that Personnel Section inform Mr. Tibebe Desta accordingly". No written confirmation was ever received and, furthermore, there is no recollection in the ECA Personnel Office of any telephone conversation connected with Mr. Desta in this respect.

IV. In this sequence of events, the Tribunal notes the following irregularities: (a) failure to submit the recommendation concerning the Applicant to the APC for the 1985 promotion review exercise; (b) rejection of his recourse against his exclusion in the 1985 promotion review exercise on the erroneous ground that Mr. Desta was serving under the 200 Series; (c) failure to duly inform the Applicant of the rejection of his recourse and of the motives for such rejection; (d) postponement of the consideration of Mr. Desta's case in the 1986 promotion exercise on the basis of verbal information never confirmed in writing.

V. As a consequence of this conduct, the Applicant was deprived of his right to be considered for promotion in the 1985 and 1986 promotion review exercises, the latter of which was postponed until 1987. The 1987 promotion review exercise was delayed until 1989, but the Applicant was excluded from consideration as a result of a change in the rules making him ineligible.

VI. On 29 February 1988, the Applicant sought redress by requesting to be promoted retroactively to January 1985. The Administration rejected this request on 11 October 1989, twenty months later, thus adding delay as a new detrimental factor against the Applicant.

VII. The case was duly considered by the JAB, whose recommendations were as follows:

"Recommendations

28. The Panel recommends that no action be taken on the appellant's request for promotion or retroactive promotion to 1985.

29. The Panel recommends the granting of an SPA for the period 5 September 1982 to 25 November 1985, in compensation of work performed at a higher level during that period.

30. The Panel also recommends the payment of monetary compensation for the injury he has suffered equivalent to three months salary."

VIII. The Tribunal concurs with the JAB in not supporting the Applicant's claim to be promoted retroactively. It has been the Tribunal's consistent jurisprudence that staff members have no entitlement to promotion and therefore the Applicant cannot claim that his rights have been violated by not having been promoted at a particular time. But, even if staff members have no right to promotion, the Tribunal recalls that staff members have the right to be duly considered for promotion and that, as a consequence, if consideration of a staff member is improperly omitted in a promotion review exercise, the Administration is responsible.

IX. The Tribunal finds that there is ample evidence that such an omission and several other irregularities, as described above, occurred in the present case. The Tribunal notes in this respect that the Respondent has admitted these facts and expressed in his answer that "there is no denial that these deficiencies occurred and prevented Applicant from being given the fullest consideration for promotion to which he was entitled".

X. It is as a consequence of this admission that the Respondent agreed to the JAB's recommendations. Having done so, the Respondent asserts that the only issue left to be decided is the Applicant's claim to retroactive promotion.

XI. The Tribunal, while reasserting that the Applicant is not entitled to retroactive promotion as a consequence of not having been entitled to promotion in the first place, nevertheless differs with the Respondent's view that the only claim to be decided is retroactive promotion. The

Tribunal has also to consider the extent of the responsibility incurred by the Respondent as a consequence of depriving the Applicant of his right to be duly considered for promotion as well for the other irregularities mentioned above.

XII. In this respect the Tribunal finds that the granting of a Special Post Allowance for the period 5 February 1982 to 25 November 1985, cannot be considered as compensation for the misconduct of the Administration since it was awarded, as the JAB report states, "in recognition of the work performed at a higher level during that period". Thus, the only compensation recommended by the JAB and accepted by the Respondent is the equivalent of the three months' salary referred to in the JAB report.

XIII. It is the Tribunal's view that that amount of compensation is inadequate. Consequently, the Tribunal awards additional compensation in the amount of three months' net base salary.

XIV. For the foregoing reasons, the Tribunal decides:

(a) To reject the Applicant's plea to be promoted retroactively;

(b) To order the Respondent to pay to the Applicant additional compensation in the amount of three months net base salary.

XV. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Ahmed OSMAN
Second Vice-President

Luis de POSADAS MONTERO
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary